IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 21, 2007

# STATE OF TENNESSEE v. KEVIN PAUL LANDEEN

**Appeal from the Criminal Court for Knox County**
**No. 80942 Richard R. Baumgartner, Judge**

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**No. E2006-02282-CCA-R3-CD - Filed October 29, 2007**

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The Appellant, Kevin Paul Landeen, pled guilty in the Knox County Criminal Court to the crimes of vehicular homicide by intoxication, reckless endangerment, and driving on a revoked or suspended license. Following a sentencing hearing, the trial court denied Landeen's request for an alternative sentence and instead ordered that his sentences be served in the Department of Correction. Landeen now appeals the sentencing court's decision denying him the alternative sentence of split confinement. After thorough consideration of the entire record, we affirm.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed**

DAVID G. HAYES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Mark E. Stephens, District Public Defender; and John R. Halstead, Assistant Public Defender, Knoxville, Tennessee, for the Appellant, Kevin Paul Landeen.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Ta Kisha M. Fitzgerald, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION

### Factual Background

On December 15, 2004, a Knox County grand jury returned a presentment charging the Appellant with several offenses related to a car accident that occurred on April 23, 2004, in which the Appellant was the driver of the vehicle and his passenger, Ashley Williams, was killed. Count one of the presentment charged the Appellant with vehicular homicide by intoxication, count two alleged vehicular homicide, count three charged reckless endangerment, and counts four through seven alleged various driver's license violations. The Appellant was arraigned and appointed counsel.

At a submission hearing before the trial court on July 17, 2006, the stipulated facts related to the car accident, as recited by the State, are as follows:

> . . . The testimony would be that back in April of [2004] – Ashley Williams and [the Appellant] were dating. They attended a party at Ricky Hickman's house. While at the party, Ricky Hickman observed [the Appellant] and believed him to be under the influence of alcohol. However, he says that he told [the Appellant] he shouldn't be driving.
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> A short time later [the Appellant] and Ms. Williams were in the car, and [the Appellant] was driving. He was traveling at approximately 72 miles an hour. He came up behind a driver, David Cardwell. The brakes were applied. The car spun out of control so that the passenger side door of the car ended up hitting a tree. They were traveling east. So they go across a lane of traffic, and the passenger side door slams into a tree. They avoid an oncoming car.
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> Police respond. [The Appellant] is determined to be the driver. Ms. Williams is dead or is – suffered serious injuries in the passenger side of the car. She is extricated from the car. The paramedics attempt to perform life-saving procedures on Ms. Williams as they transport her to the hospital. She eventually dies. [The Appellant], his blood is taken. His blood alcohol content is determined to be .25.

The Appellant allegedly had no recollection of the accident. At the hearing, defense counsel disputed the events immediately preceding the crash, citing police reports describing the cause of the accident as someone pulling the emergency parking brake which caused the vehicle to spin. It was stipulated that the Appellant had been driving on a revoked or suspended license at the time of the crimes.

Under the terms of a plea agreement, the Appellant entered guilty pleas to count one, vehicular homicide by reason of intoxication with regard to the victim, Ashley Williams; count three, reckless endangerment of the motorist, David Cardwell; and count four, driving on a revoked or suspended operator's license. As provided by the plea agreement, the Appellant received a sentence of eight years for vehicular homicide, a Class B felony; one year for reckless endangerment, a Class E felony; and six months for driving on a revoked license, a Class B misdemeanor. The Appellant was sentenced as a Range I offender with all sentences to run concurrently. Pursuant to the plea agreement, the manner of service of the felony sentences was submitted to the trial court for its determination. Following a sentencing hearing, the court denied the Appellant's request for split confinement and ordered that the felony sentences be served in the Department of Correction.

**Analysis**

The Appellant contends that the sentencing court erred by denying him a sentence of split confinement. He acknowledges that, because he was convicted of vehicular homicide by

intoxication, a Class B felony, he is not presumed to be a favorable candidate for alternative sentencing. The Appellant argues, however, that, pursuant to statute, his effective sentence of eight years deems him eligible for probation.[1] The Appellant concedes that it was his burden to establish his own suitability for probation, but he asserts that the sentencing court failed to place the appropriate weight on all of the relative factors for such a determination. Specifically, he asserts that the sentencing court placed special weight on the fact that a death occurred in reaching its decision to order that he serve his sentence in the Department of Correction. The Appellant asks this court to vacate the sentencing decision below and order that he serve twelve months in confinement, with the remainder of his sentence to be served on probation.

In response, the State argues that the sentencing court did not abuse its discretion in denying the Appellant split confinement. The State alleges that the court, in reaching its decision on sentencing, focused on the facts that the Appellant had a prior criminal record and that he had pled guilty to another driving under the influence offense subsequent to the offense at issue. The State asserts that these facts support the sentencing court's decision and that the Appellant failed to carry his burden to establish otherwise.

When the sentencing court properly considers the relevant sentencing considerations, this court conducts a *de novo* review with the presumption that the determination made by the trial court is correct. T.C.A. § 40-35-401(d) (2003); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the Appellant. T.C.A. § 40-35-401, Sentencing Commission Comments; *Ashby*, 823 S.W.2d at 169.

Alternative sentencing methods may be denied if it is shown that the defendant has a long history of criminal conduct, that the defendant has not been rehabilitated with less restrictive methods, or that confinement is necessary to avoid depreciating the seriousness of the offense. T.C.A. § 40-35-101(1)(A)-(C) (2003). Additionally, the potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of term to be imposed. T.C.A. § 40-35-101(5).

The presentence report for the Appellant revealed prior convictions for aggravated assault and "burglary of a conveyance" in Florida in 1993. In 1996, the Appellant was convicted of violating his Florida probationary status. Testimony at the sentencing hearing established that the Appellant was also arrested for possession of drug paraphernalia on March 27, 2006, and admitted his guilt to the arresting officer. On March 31, 2006, the Appellant was found guilty of violating probation in Sevier County based upon his failure to perform community service and failure to pay fines and/or costs to the Sevier County General Sessions Court. Moreover, proof established that

[1] For offenses committed on or after June 7, 2005, a defendant is eligible for probation if the sentence actually imposed is ten years or less. T.C.A. § 40-35-303(a) (2006). However, as the State correctly notes, because the Appellant in this case committed the offenses prior to June 7, 2005, the previous version of the statute controls, which provided that a defendant would be eligible for probation if the sentence actually imposed was eight years or less. *See* T.C.A. § 40-35-303(a) (2003). We note this distinction only for the purposes of clarity, as under either version of the statute, the length of the Appellant's sentence would afford him such eligibility.

subsequent to the instant convictions, the Appellant was arrested in Sevier County for DUI and pled guilty to that offense. The presentence report also reflects that the Appellant is in arrearage of $8,107.00 for the support of his two minor children. Additionally, the presentence report indicates that the Appellant resides at the Rainbow Motel in Gatlinburg. The Appellant did not testify at the sentencing hearing.

At the conclusion of the hearing on October 5, 2006, the trial court made the following determinations in support of its sentencing decision:

> You know, Mr. Landeen, death is different. Any way you look at it, when somebody loses their life, that's a different situation. The facts in this case, as I understand it, are that you were extremely intoxicated. It's not, you know, heavily intoxicated. It's severely intoxicated. You've got to drink a lot of alcohol to get to .25 [blood alcohol content], and for you to get in a vehicle and to acknowledge that you're speeding at the time that you do that, indicates to me a tremendous lack of judgment. It doesn't mean you have a, you know – I can't even say the word, but a heart of anger or a heart of malice, but it's an incredibly bad lack of judgment, and as a result of that Ms. Williams is dead. That doesn't mean that, you know, I shouldn't consider all the other factors in this case, but let's look at those other factors.
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> Number one, you have – you have prior convictions – felony convictions out of the state of Florida; number two and probably most importantly, not only are you guilty of this offense, but then after this offense you are again charged with and plead guilty to driving under the influence, being on the highway under the influence of alcohol, subjecting yourself and others on the road to danger.
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> I think based on that history, Mr. Landeen, that the appropriate sentence in this case is for you to serve your sentence in the [D]epartment of [C]orrection[] as opposed to being released on probation. I hope you take this opportunity to reassess where you are in life and change that situation.
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> So I'm going to find that you are not appropriate for probation. I'm going to deny your application for probation and order you to serve your sentence in the [D]epartment of [C]orrection[]. Thank you.

The sentencing court properly considered all of the relevant factors in reaching its decision to deny the Appellant an alternative sentence. The record demonstrates that the Appellant has a history of criminal conduct, and the court appropriately recognized that some of these offenses occurred after the tragic offense at issue in this case. *See* T.C.A. § 40-35-101(1)(A)-(C). These considerations supported a determination that the Appellant has not been rehabilitated by less restrictive methods and that confinement was necessary to avoid depreciating the seriousness of the offense. *Id*. The Appellant carries the burden on appeal to establish that the sentence was improper,

T.C.A. § 40-35-401, and we agree with the State that he has not satisfied this burden. Accordingly, we conclude that the sentencing court committed no error in ordering that the Appellant serve a sentence of confinement in the Department of Correction.

## CONCLUSION

Based upon the foregoing, the judgment of the Knox County Criminal Court is affirmed.

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DAVID G. HAYES, JUDGE